Supreme Court, U.S.
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No. 99 242 AUG 10 1999

IN THE
SUPREME COURT OF THE UNITED STATES

TAYLOR COMMUNICATIONS GROUP, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,,
Plaintiff-Respondent.

PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; JUDY WALSH; PATRICIA CURRAN; TIME WARNER COMMUNICATIONS OF AUSTIN, INC.; TIME WARNER COMMUNICATIONS OF HOUSTON, L.P.; AND FIBRCOM, INC.,
Defendants-Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Taylor Communications Group, Inc. maintains a direct, substantial, and legally protectable interest in the Texas Public Utility Commission's Order in Docket No. 18082 sufficient to entitle Taylor to intervene in the underlying litigation as a matter of right pursuant to FED. R. CIV. P. 24.

PARTIES TO THE PROCEEDING

Petitioner

Taylor Communications Groups, Inc. has no parent corporations or non-wholly owned subsidiaries.

Respondents

Southwestern Bell Telephone Co., Pat Wood, III, Judy Walsh, Patricia Curran, Time Warner Communications of Austin, Inc., Time Warner Communications of Houston, L.P., and Fibrcom, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Taylor Communications Group, Inc., respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Taylor Comm. Group, Inc. v. Southwestern Bell Tel. Co.*, 172 F.3d 185 (5th Cir. 1999) (App. A). The Court of Appeals' denial of Taylor's Petition for Rehearing is a decision without a published opinion and can be found at 1999 U.S. App. LEXIS 11839 (App. E). The opinion of the United States District Court for the Western District of Texas, Midland-Odessa Division, is an unpublished opinion and can be found at *Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 1998 U.S. Dist. LEXIS 11279.

JURISDICTION

On April 28, 1998, the United States District Court for the Western District of Texas denied Taylor Communications Group, Inc.'s Motion to Intervene. Taylor timely-filed its Notice Appeal, and on April 13, 1999, the United States Court of Appeals for the Fifth Circuit affirmed the district court's denial of Taylor's Motion. On May 14, 1999, the Fifth Circuit denied Taylor's timely-filed Petition for Rehearing. Pursuant to United States Supreme Court Rule 13.1, this Petition for Writ of Certiorari has been filed within 90 days after the Fifth Circuit's denial of rehearing.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Federal Rule of Civil Procedure 24(a) provides, in relevant part:

> Upon timely application anyone shall be permitted to intervene in an action...(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

A. Introduction

Congress passed the Federal Telecommunications Act ("FTA") in 1996 in an effort to increase competition for telecommunications services. To promote competition, the FTA requires Incumbent Local Exchange Carriers ("ILECs") to allow Competitive Local Exchange Carriers ("CLECs") to "interconnect" with the ILEC's network. 47 U.S.C. § 251(a)(1); (c)(2); and 252(a). SWBT is an ILEC. Time Warner and Taylor are both CLECs.

The threshold issue in the underlying case, Docket No. 98-50787, *Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas, et al*; In the United States Court of Appeals for the Fifth Circuit, is whether telephone calls made to an Internet Service Provider ("ISP") are local or interstate in nature. Resolution of the foregoing issue is dispositive of the

underlying dispute: whether an ILEC is required to pay reciprocal compensation to a CLEC for phone calls that terminate at ISPs pursuant to (1) 47 U.S.C. § 251, and (2) the interconnection agreements entered into between the ILEC and CLEC. The issue of whether phone calls made to an ISP are local or interstate in nature is an issue of first impression in the Fifth Circuit.

B. Factual Background

Time Warner Communications of Austin, L.P., Time Warner Communications of Houston, L.P.; and Fibrcom, L.P. (collectively "Time Warner"), entered into two interconnection agreements with Southwestern Bell Telephone Company ("SWBT") in 1997, both of which were approved by the Public Utility Commission of Texas ("TPUC"). SWBT alleges that during the negotiation process, Time Warner concealed from SWBT the fact that Time Warner would seek to provide telecommunications services to ISPs and would consider calls to ISPs to be local.

In contrast, when Taylor and SWBT negotiated their interconnection agreement, Taylor specifically told SWBT that it would seek ISPs as customers. In direct response to Taylor's disclosure that it would seek ISPs as customers, SWBT refused to agree to the $.01 per minute of usage rate it gave to other CLECs and instead offered Taylor only a lower rate of $.009 per minute of usage. Taylor and SWBT agreed upon the reduced rate.

C. Procedural Background

This case has its genesis in Docket No. 18082, *Complaint and Request for Expedited Ruling of Time Warner Comm. Inc., against Southwestern Bell Tel. Com.*, a complaint Time Warner filed with the TPUC.

In TPUC Docket No. 18082, Time Warner alleged breach of the Time Warner-SWBT interconnection agreement for SWBT's failure to pay Time Warner reciprocal compensation pursuant to the interconnection agreement and 47 U.S.C. §§ 251(a)(5) and 252(d)(2). The TPUC entered an order requiring SWBT to pay reciprocal compensation for the termination of local telecommunications traffic. Most notably, the TPUC's order on Docket No. 18082 classified calls to Internet service providers ("ISPs") as local rather than interstate.

Although Taylor's interconnection agreement with SWBT was nearly identical to the Time Warner-SWBT agreement, SWBT claimed that the TPUC's decision in TPUC Docket No. 18082 did not apply to the Taylor-SWBT interconnection agreement because, to paraphrase SWBT, that Order was limited only to the facts of the Time Warner-SWBT dispute. Disagreeing with SWBT's interpretation of the TPUC's Order on Docket No. 18082, Taylor subsequently filed with the TPUC Docket No. 18975, *Complaint and Request for Expedited Ruling and Interim Relief of Taylor Communications Group, Inc., against Southwestern Bell Tel. Co.* The TPUC disagreed with SWBT's position and entered an order in favor of Taylor, specifically and expressly making TPUC's Order on Docket No. 18082 applicable to the Taylor-SWBT agreement. (App. 16a-17a; 19a). By virtue of the TPUC mandating that its Order on Docket No. 18082 was binding on Taylor's dispute with SWBT, Taylor believes that

it acquired a substantial, legally protectable interest in the TPUC's Order on Docket No. 18082, in addition to its existing property rights in its interconnection agreement with SWBT.

SWBT sought review of the TPUC's decision in Docket No. 18082. On March 19, 1998, SWBT filed its Complaint for Declaratory and Injunctive Relief in the United States District Court for the Western District of Texas. On April 1, 1998, SWBT filed its Application for Preliminary Injunction. The Application for Preliminary Injunction sought to enjoin the TPUC from enforcing its Order not only on Docket No. 18082 (Time Warner), *but also on Docket No. 18975* (Taylor). (App. 25a-27a; 29a). By specifically naming Taylor in its Application for Preliminary Injunction SWBT asked the court to affect Taylor's legal rights and obligations. *Id.* (Seeking temporary and permanent injunction prohibiting Time Warner, the TPUC, and "anyone acting in concert with them" from (1) seeking to enforce the TPUC's decision on Docket No. 18082, (2) applying it as a rule of decision in other cases or an order of general applicability, or (3) allowing other carriers to claim the Order on Docket No. 18082 as precedent affecting their negotiations or contracts).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE EIGHTH CIRCUIT'S DECISION IN *LITTLE ROCK SCHOOL DIST. V. PULASKI SPECIAL COUNTY SCHOOL DIST. NO. 1* ON THE ISSUE OF WHETHER A PROPOSED INTERVENER MUST DEMONSTRATE THAT ITS INTERESTS WOULD NECESSARILY BE IMPAIRED BY THE OUTCOME OF THE UNDERLYING LITIGATION

Taylor's Petition for Writ of Certiorari should be granted because the opinion of the court below in the Fifth Circuit conflicts with the Eighth Circuit's decision in *Little Rock School Dist. v. Pulaski Special County School Dist. No. 1*, 738 F.2d 82 (8th Cir. 1984) (App. 56a), on the issue of whether a proposed intervener must demonstrate that its interests would be necessarily be impaired by the outcome of the underlying litigation.

When seeking to intervene as a matter of right pursuant to FED R. CIV. P. 24 (a) (App. 65a-66a), statutory and case law make it abundantly clear that Rule 24(a) does not require a proposed intervener to show that its interests will necessarily be impaired by the outcome of the litigation. FED R. CIV. P. 24 (a) (stating that "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action ***may as a practical matter impair or impede the applicant's ability to protect that interest...***") (emphasis added); *Pulaski*, 738 F.2d at 84 (App. 59a-60a)

("the rule does not require, after all, that appellants demonstrate to a certainty that their interests will be impaired in the ongoing action); *see also Jenkins by Agyei v. The State of Missouri*, 967 F.2d 1245, 1248 (8th Cir. 1992) (App. 53a-54a) ("the language of the rule itself contemplates that the affected party can intervene in proceedings that 'may' affect him before harm is done by execution of a court order" and "a party claiming an interest in the litigation does not have to wait until he has suffered irreparable harm before he has an interest permitting intervention under Rule 24(a)."); *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) (App. 63a) ("The applicants [for intervention], however, need not show that substantial impairment of their interest will result..., nor, from the language of Rule 24(a), that impairment will inevitably ensue from an unfavorable disposition. . . ."); *Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967) (App. 43a-44a) ("Prior to the 1966 amendment of Rule 24, the Commissioner would probably not have been entitled to intervene in this action, for the pre-amendment Rule required that the applicant might be 'bound' by the judgment. . . .") (quotation in original).

In the court below, the Fifth Circuit affirmed the district court's denial of Taylor's motion to intervene. The Fifth Circuit concluded that "Taylor's interest in the underlying litigation is too speculative and general to support intervention as of right" and, consequently, held that "Taylor does not have an interest in the underlying litigation sufficient to meet the second requirement for intervention as of right. . . ." Although the court's opinion couches Taylor's failure to meet the requirements of Rule 24(a) as a failure to demonstrate that it has an "interest" in the underlying litigation, in fact, the Fifth Circuit's decision is based solely on whether Taylor's "interest" may or may not be impaired by the outcome of the underlying litigation. That the Fifth

Circuit's rationale for affirming the denial of Taylor's motion is based upon the "impairment" prong of the analysis is made crystal clear by the following excerpt from the Fifth Circuit's opinion at Appendix 6a-7a:

> Our *Espy* holding is factually distinguishable from the case at bar. In *Espy*, a ruling contrary to the position of the timber industry was certain to affect the already existing contracts. That is not the case here. In the case before us, a ruling in favor of Southwestern Bell's position might adversely affect Taylor's position, but not necessarily. Taylor concedes this point in its arguments to this Court. First, in its brief, Taylor addresses the fourth requirement for intervention as of right, that the movant's interests must be inadequately represented by the existing parties to the suit. In arguing that Time Warner could not adequately represent Taylor's interests, Taylor notes "As a result of the difference in the negotiation postures of the respective interconnection agreements, Time Warner cannot assert certain claims and defenses available to Taylor." In short, Taylor's agreement with Southwestern Bell is factually distinct from Time Warner's agreement with Southwestern Bell. It would be pure speculation to say that a judicial pronouncement as to the Time Warner case *would necessarily affect* Taylor's agreement with Southwestern Bell. Because the cases are factually different, the resulting application of existing law *may necessitate a different result*. Taylor's counsel conceded this point at oral

> argument, stating Taylor "might not be bound" by the district court's decision in this case. In essence, *Taylor seeks to intervene as of right in litigation which Taylor concedes may have no impact on its contract with Southwestern Bell. Taylor has no such right.* (Emphasis added).

Simply stated, the Fifth Circuit held that because Taylor could not demonstrate that its interests would necessarily be impaired by the outcome of the underlying litigation, it had no right to intervene. The Fifth Circuit's holding in the case *sub judice* is, however, in direct contradiction to the Eighth Circuit's holding in *Pulaski*. *See also Jenkins*, 967 F.2d at 1248 (App. 53a-54); *Purnell*, 925 F.2d at 948 (App. 63a); and *Nuesse*, 385 F.2d at 701 (App. 43a-44a).

In *Pulaski*, the plaintiff was a school district in Pulaski County, Arkansas which contended that two other school districts were responsible for causing the schools in Pulaski County to remain segregated. *Pulaski*, 738 F.2d at 83 (App. 56a-57a). The plaintiff school district sued the two defendant school districts and sought to consolidate all three districts into one. *Id.* The proposed interveners were teacher's associations who represented the teachers employed by the three school districts. *Id.* Each of the school districts had agreed to bargain collectively with the respective teachers associations. *Id.* The proposed interveners opposed the consolidation because at the time of the litigation, there existed contracts reached pursuant to collective bargaining measures between the teachers' associations and the school districts. *Id.* The contracts governed the salaries, hours, and terms and conditions of employment of the teachers in the respective school districts. *Id.* The proposed interveners

feared that a single, consolidated district would not bargain collectively with the teachers' associations and, consequently, sought to present evidence at a hearing to remedy the alleged unconstitutional condition, i.e., segregated schools. *Id.* In holding that the proposed interveners satisfied the criteria for intervention under Rule 24(a), the Eighth Circuit emphasized the "impairment of interest" requirement:

> As representatives of the classroom teachers in the three districts, appellants have an interest in the existing agreement, which they themselves have negotiated with the districts involved, and in the continued viability of these agreements. One of the remedies being considered by the District Court is consolidation, the effect of which would be to terminate the independent existence of the three school districts presently functioning in Pulaski County and substitute in their place a new, single, consolidated district. Those who have a contract with existing entities have an interest in the continued existence of those entities. It may be true that the successor school district (assuming consolidation is ultimately ordered) will choose to bargain collectively with the appellant organizations, but there can be no assurance of that fact. In addition, even if a successor district does agree to bargain collectively with appellants, there is no assurance that whatever contract will then be agreed on will be as favorable to appellants' members as the present agreements are. In this situation, we think appellants qualify for intervention as of right. *The rule does not*

> *require, after all, that appellants demonstrate to a certainty that their interests will be impaired in the ongoing action. It requires only that they show that the disposition of the action 'may as a practical matter' impair their interests.* We are satisfied that this demonstration has been fully made.

Pulaski, 738 F.2d at 84 (App. 59a-60a) (emphasis added, quotation in original).

The Eighth Circuit's holding in *Pulaski* stands in stark contrast to the Fifth Circuit's conclusion that "[i]t would be pure speculation to say that a judicial pronouncement as to the Time Warner case would necessarily affect Taylor's agreement with Southwestern Bell," and consequential holding that because "Taylor seeks to intervene as of right in litigation which Taylor concedes may have no impact on its contract with Southwestern Bell," Taylor's right to intervene does not exist. (App. 7a). This Honorable Court should grant Taylor's Petition in order to resolve the conflict between the Eighth and Fifth Circuits.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE EIGHTH CIRCUIT'S DECISION IN *JENKINS V. THE STATE OF MISSOURI* ON THE ISSUE OF WHETHER A PROPOSED INTERVENER HAS A LEGAL "INTEREST" IN A JUDGMENT FOR PURPOSES OF RULE 24

Even if the Fifth Circuit's decision is based on Taylor's alleged failure to demonstrate an "interest," Taylor's Petition should be granted because the Fifth Circuit's decision is in direct conflict with the Eighth Circuit's decision in *Jenkins v. The State of Missouri*, 967 F.2d 1245 (8th Cir. 1992), on the issue of whether a proposed intervener has a legally protectable "interest" in a judgment which may affect the proposed intervener.[1]

In *Jenkins*, the plaintiffs were a group of property owners residing within a certain school district. The property owners were opposed to a tax increase which was to be

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[1] In the underlying litigation, SWBT relied upon public policy and legal, contract interpretation arguments. On February 26, 1999 the FCC resolved the policy issue at stake. 64 Fed. Reg. 56, *Inter-Carrier Compensation for ISP-bound Traffic*, (CC Docket No. 96-98, FCC 99-38). Consequently, SWBT's sole redress is to call into question the TPUC's interpretation of the Time Warner-SWBT agreement, and seek to apply a favorable ruling to all of its agreements interpreted by the TPUC, including Taylor's. These facts underscore the heightened interest of Taylor in the underlying litigation.

levied on the property within the school district in order to provide for a pay raise for the school district's employees.

A brief chronology of the events in *Jenkins* is in order. On July 3, 1990, the district court entered an order announcing a proposed settlement agreement under which the property taxes would be increased to pay for the raises of the school district's employees. *Jenkins*, 967 F.2d at 1247 (App. 50a-51a). On July 17, the proposed interveners, i.e., property owners, attended a hearing on the proposed settlement agreement and argued against its approval by the court. *Id.* On July 23, the court approved the settlement agreement raising the property taxes. *Id.* On August 20, the school board voted to actually levy the tax. *Id.* The proposed interveners filed a notice of appeal on August 22, the date the appellate deadline expired. *Id.* The proposed interveners did not attempt to intervene, however, until August 28, six full days after the order approving the settlement became final and the deadline to appeal expired. *Id.* The proposed intervention was for the limited purpose of appellate review. *id.* On October 23, the district court granted the motion to intervene stating that "once final judgment was entered, the taxpayers had a legal interest which satisfied the requirements of Rule 24." *Id.*

The Eighth Circuit dismissed the proposed interveners' appeal, however, noting that (1) the proposed interveners were not a party to the underlying case, and (2) because no party the case appealed the district court's decision, there was no underlying appeal into which they could intervene. *Jenkins*, 967 F.2d at 1247 (App. 53a). The Eighth Circuit indicated that the proposed interveners should have moved for intervention in the underlying litigation before the expiration of the appellate deadline. In response, the proposed interveners argued that they "had no 'justiciable interest' that

had been 'impaired' until the school board voted to levy" the tax increase on August 20 and, "therefore, it was impracticable [sic] for them to move for intervention before the time for appeal ran on August 22." *Id.* at 1248 (App. 53a).

The Eighth Circuit rejected the proposed interveners' argument, noting that [t]he language of [Rule 24] itself contemplates that the affected party can intervene in proceedings that 'may' affect him before harm is done by execution of a court order." *Id.* (Quotation marks in original). Further, the Eighth Circuit stated that "[a] party claiming an interest in litigation does not have to wait until he has suffered irreparable harm before he has an interest permitting intervention under Rule 24(a)." (App. 54a) Contrary to the Fifth Circuit's position that Taylor had no legally protectable "interest" in the TPUC's Order on Docket No. 18082, the Eighth Circuit concluded that "[o]n July 23 the court approved the settlement; at that time (at the very latest) the taxpayers had an interest protectible [sic] by intervention as of right." (Parenthetical in original). Taylor's Petition should be granted to resolve the conflict between the Circuits.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE FORMER D.C. CIRCUIT'S DECISION IN *NEUSSE V. CAMP* ON THE ISSUE OF WHETHER PARTICIPATION AS *AMICUS CURIAE* IS AN ADEQUATE SUBSTITUTE FOR PARTICIPATION AS A PARTY

Taylor's interconnection agreement with Southwestern Bell is essentially identical to the Time Warner-SWBT agreement, with the exception of the rates for reciprocal compensation and the facts that took place during the negotiation of the Agreement. Nevertheless, in affirming the district court's denial of Taylor's motion to intervene, the Fifth Circuit relies significantly on the following portion of its opinion:

> Taylor relies on a second aspect of the *Espy* decision to support its theory of an interest in the underlying litigation. *Espy* states that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Taylor emphasizes to this Court the language "involving as many apparently concerned persons," while ignoring the phrase "as is compatible with efficiency and due process." Taylor was not the only party seeking to intervene in this matter. Waller Creek Communications Co., also filed a motion to intervene. Further, an additional six

> telecommunications companies sought leave to participate as amicus curiae. This leaves the district court with no less than ten telecommunications companies, including Time Warner and Southwestern Bell, not to mention TPUC, all attempting to have their say in this litigation. Had these other companies sought to follow the route chosen by Taylor, each of these companies could seek to litigate different factual aspects of their individual contracts, as Taylor admittedly sought to do, in seeking to prevail. We fail to see how litigating nine different contracts simultaneously is compatible with efficiency and due process. The district court instead properly permitted the filing of amicus briefs.

(App. at 7a-8a.)

Essentially, the Fifth Circuit ruled that participation as an *amicus curiae* is an adequate substitute for participation as a party. The Fifth Circuit's decision on those grounds is in direct conflict with the decision of the former Court of Appeals for the District of Columbia Circuit in *Nuesse*. In holding that the proposed intervener was "entitled to participate as a party and not merely as a friend of the court," the *Nuesse* Court noted that a proposed intervener "is often relegated to the status of *amicus curiae* when intervention is properly denied" but that *amicus* status "is not an adequate substitution for participation as a party." *Neusse*, 385 F.2d at (App. at 47a). Taylor's Petition should be granted so that this Honorable Court may resolve the conflict.

IV.
THE PETITION SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS MISAPPLIED A PROPERLY STATED RULE OF LAW

If the Court decides not to grant Taylor's Petition based upon the foregoing considerations, Taylor asserts that the Petition should be granted because the Fifth Circuit clearly misapplied a properly stated rule of law, i.e., Rule 24(a), which provides in pertinent part:

> Upon timely application anyone shall be permitted to intervene in an action...(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action *may as a practical matter impair or impede the applicant's ability to protect that interest*, unless the applicant's interest is adequately represented by existing parties.

"Fifth Circuit precedent establishes that 'the inquiry under [FED. R. CIV. P. 24(a)(2)] is a flexible one, which focuses on the particular facts and circumstances surrounding each application...and intervention of right must be measured by a practical rather than technical yardstick.'" *United States of America v. Texas Eastern Transmission Corp.*, 923 F.2d 410, 413 (5th Cir. 1991) (quoting *United States of America v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976)).

The Fifth Circuit has crafted a test which incorporates each element of FED. R. CIV. P. 24(a)(2): An applicant for intervention as a matter of right must (1) timely file an application to intervene; (2) demonstrate a "direct, substantial, legally protectable" interest in the property or transaction which is the subject of the action; (3) show that disposition of the case without the intervener would impair its right to protect that interest; and (4) meet the "minimal burden of showing [its] interest is inadequately represented by the existing parties." *Ozee v. American Council on Gift Annuities, Inc.*, 110 F.3d 1082, 1094-1096 (5th Cir. 1997). In the instant case, the Fifth Circuit misapplied Rule 24 as it relates to the second and third prongs in the foregoing sentence.

A. "Direct, Substantial, Legally Protectable Interest"

The Fifth Circuit has held that an interest in existing contracts which may be affected by a judicial or administrative decision that is applicable to a specific segment of a specific industry constitutes a "direct, substantial, and legally protectable interest" under Rule 24(a). *Espy*, 18 F.3d at 1207 (App. 39a). In the instant case, however, the Fifth Circuit has misapplied Rule 24(a) by holding that Taylor does not have a "direct, substantial, and legally protectable interest" in its existing interconnection agreement with SWBT which will be affected by the ultimate resolution of the "reciprocal compensation" issue in the underlying litigation. This Honorable Court should grant Taylor's Petition to correct the district court's misapplication of Rule 24, and the Fifth Circuit's sanctioning thereof.

B. "Impairment of Interest"

It is well-settled that a proposed intervener is not required to demonstrate that its interests would *necessarily* be affected by a judicial pronouncement before it is allowed to intervene as of right under Rule 24(a). *Kansas Pub. E'ees Retirement Sys. v. Reimer & Kroger Assoc's*, 60 F.3d 1304 (8th Cir. 1995) ("in 1966 the United Supreme Court amended FED. R. CIV. P. 24 to abolish a requirement that the proposed intervener 'is or may be bound by the judgment in the action' and implanted a softer standard requiring only that 'the disposition of the action may as a practical matter impair or impede the applicant's ability to protect its interest.'"); *Nuesse*, 385 F.2d 694 at 701 (App. 43a) ("Prior to the 1966 amendment of Rule 24, the Commissioner would probably not have been entitled to intervene in this action, for the pre-amendment Rule required that the applicant might be 'bound' by the judgment. . . ."") (quotation in original). Notwithstanding this well-settled proposition of law, the Fifth Circuit noted that "a ruling in favor of Southwestern Bell's position *might* adversely affect Taylor's position, but *not necessarily*." (App. 6a) (emphasis added). The appeals court accordingly held that because Taylor did not show that it would *necessarily* be bound by a judicial pronouncement in the Time Warner case, "Taylor's interest in the underlying litigation is too speculative to support intervention as of right." (App. 6a).

In support of its ruling, the Fifth Circuit attempts to distinguish the *Espy* case upon which Taylor relied in the district court, stating:

> Our *Espy* holding is factually distinguishable. In *Espy*, a ruling contrary to the position of the timber industry was certain

> to affect the already-existing contracts. That is not the case here. In the case before us, a ruling in favor of Southwestern Bell's position might adversely affect Taylor's position, but not necessarily. * * * * In short, Taylor's agreement with Southwestern Bell is factually distinct from Time Warner's agreement with Southwestern Bell. It would be pure speculation to say that a judicial pronouncement as to the Time Warner case would necessarily affect Taylor's agreement with Southwestern Bell. Because the cases are factually different, the resulting application of existing law *may necessitate a different result*.

(App. 6a-7a) (emphasis added). The Fifth Circuit's conclusion that the "resulting application of existing law *may* necessitate a different result," necessarily implies that the resulting application of existing law *may not* necessitate a different result. Essentially, the Fifth Circuit acknowledges the fact that Taylor *may be bound* by *stare decisis*, a standard which is much more stringent than the standard which Taylor is required to satisfy via Rule 24(a), i.e., that "the disposition of the action may as a practical matter impair or impede [Taylor's] ability to protect that interest." In sum, notwithstanding (1) the fact that in 1966 this Honorable Court eliminated the requirement under Rule 24(a) that a proposed intervener demonstrate that it "is or may be bound by the judgment in the action," and (2) the Fifth Circuit's implicit, yet unavoidable, admission that Taylor may be bound by *stare decisis*, the Fifth Circuit, illogically, now apparently requires a proposed intervener demonstrate that "a ruling contrary to the position of the [proposed intervener] is certain to affect the already-existing contracts" of the proposed intervener. (App. 6a). The Fifth Circuit's holding in the case *sub judice* is,

plain and simple, a misapplication of Rule 24(a), and the Honorable Court should grant Taylor's Petition to correct the misapplication.

CONCLUSION

The Fifth Circuit Court of Appeals' decision in this case is inconsistent with the interpretation of Rule 24(a) by the Eighth Circuit, among other Circuits, and is in flat contradiction to the literal language and spirit of Rule 24(a). Taylor's Petition should be granted because the failure to do so would effectively result in the reinstatement of the pre-1966 version of Rule 24(a) at the hand of the judiciary. Supreme Court guidance is necessary to prevent (1) the evisceration of Rule 24(a) and, (2) the unilateral judicial revision of Rule 24(a).

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed: April 13, 1999]

No. 98-50528

Appeal From The United States District Court
For The Western District of Texas, Midland

TAYLOR COMMUNICATIONS GROUP, INC.,
Appellant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Plaintiff-Appellee,

v.

PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; JUDY WALSH; PATRICIA CURRAN; TIME WARNER COMMUNICATIONS OF AUSTIN, L.P.; TIME WARNER COMMUNICATIONS OF HOUSTON, L.P.; and FIBRCOM, INC.,
Defendants-Appellees.

OPINION AND ORDER

Before: WISDOM, STEWART and DENNIS, Circuit Judges.

WISDOM, Circuit Judge:

Introduction

Appellant Taylor Communications Group, Inc. (Taylor) sought to intervene in litigation involving Southwestern Bell Telephone Co. (Southwestern Bell) as plaintiff, and Time Warner Communications, Inc. (Time Warner) and the Texas Public Utilities Commission (TPUC) as defendants. The district court denied Taylor's motion to intervene as of right, or, in the alternative, for permissive intervention. Taylor now appeals. All parties to the litigation oppose Taylor's appeal. We affirm.

Background and Facts

Congress passed the Federal Telecommunications Act of 1996 (the Act) with the specific intention of opening all telecommunication markets to the public.[1] Southwestern Bell had previously held a monopoly on telephone service in this region of the country. Upon passage of the Act, Time Warner entered the market in competition with Southwestern Bell.

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[1] *SBC Communications, Inc. v. F.C.C.*, 138 F.3d 410, 413 (D.C. Cir. 1998).

The Act imposes several duties on companies which had previously held monopolies in this field. One of the duties created by the Act required Southwestern Bell to allow Time Warner to interconnect its own facilities with Southwestern Bell's network as a means of providing service. Under the Act, each company may charge the other for the use of its facilities, and those charges must be mutual and reciprocal.[2] Time Warner and Southwestern Bell entered into such an agreement, and the Texas Public Utilities Commission approved the deal. Not long after, Time Warner filed a complaint with TPUC, asserting that Southwestern Bell had failed to comply with the reciprocal compensation provisions for local telephone traffic. Southwestern Bell asserted that it had, in fact, complied to the degree required by the agreement.

The question of compliance comes down to whether calls to an Internet Service Provider (ISP) constitute local or long-distance traffic. Upon administrative review, TPUC held that the calls were local, and therefore subject to the reciprocal compensation agreement. Southwestern Bell, objecting to this ruling, filed suit in federal district court, seeking declaratory and injunctive relief preventing the implementation of the TPUC ruling.

Taylor also had an interconnection agreement with Southwestern Bell, separate and distinct from that of Time Warner. That agreement was the subject of a different administrative review which was still pending at the time Southwestern Bell filed suit. After Southwestern Bell filed

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[2] 47 U.S.C. §252(d)(2).

suit, Taylor sought to intervene. Taylor asserts that its agreement with Southwestern Bell is factually distinguishable from that of Time Warner. Nevertheless, Taylor asserts that the determination whether calls to ISP's are local in the Time Warner case would necessarily become precedent in Taylor's pending administrative conflict with Southwestern Bell.

Citing these *stare decisis* concerns, Taylor sought to intervene as of right, or in the alternative, by permission of the district court. The district court denied these motions. Taylor now appeals.

Standard of Review

We review a denial of intervention as of right *de novo*.[3] We review a denial of permissive intervention for an abuse of discretion.[4]

Intervention as of Right

To intervene as of right, Taylor must meet four prerequisites: (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair his ability to protect that interest; (4) the applicant's interest must be inadequately

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[3] *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202 n.8 (5th Cir. 1992).

[4] *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 330-331 (5th Cir. 1982).

represented by the existing parties to the suit.[5] Failure to meet any one of these requirements is fatal to a claim of intervention as of right.[6]

Timeliness

Taylor's Motion to Intervene was filed three weeks after Southwestern Bell had initiated the underlying proceedings in district court. At that point the district court had taken little substantive action on the matter. Further, both TPUC and Time Warner concede that Taylor's motion was timely filed. Southwestern Bell contends that the motion was untimely as premature, not as delinquent. Southwestern Bell's argument that Taylor filed its motion prior to the adjudication by the TPUC of its own dispute with Southwestern Bell goes to the issue of whether Taylor has an interest in the proceedings, not toward the issue of timeliness. Taylor's motion is therefore timely.

Taylor's Interest

Does Taylor have an interest relating to the property or transaction which is the subject of the action?

To answer this question we must first address the necessary preliminary issue: what is the property or

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[5] *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line co.*, 732 F.2d 452, 463 (5th Cir.), *cert. denied*, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984).

[6] *Kneeland v. NCAA*, 806 F.2d 1285, 1287 (5th Cir.), *cert. denied*, 484 U.S. 817, 108 S.Ct. 72, 98 L.Ed.2d 35 (1987).

transaction which is the subject of the action? Taylor is seeking to intervene in litigation between Southwestern Bell (the plaintiff) and Time Warner and TPUC (the defendants). The subject of the litigation is TPUC's interpretation of a provision in a contract between Southwestern Bell and Time Warner. Does Taylor have an interest in this dispute?

Taylor asserts that this analysis is controlled by our opinion in *Sierra Club v. Espy*.[7] *Espy* involved a motion to intervene filed by two forest industry trade associations, seeking intervention in litigation between three environmental organizations and the Secretary of Agriculture. This Court held that the movants had "legally protectable property interests in existing timber contracts . . . threatened by the potential bar on even-aged management."[8] Taylor contends that it, similarly, has a legally protectable property interest in its contract with Southwestern Bell which is threatened by a potential finding that calls to ISP's are not subject to the reciprocity agreement.

Our *Espy* holding is factually distinguishable from the case at bar. In *Espy*, a ruling contrary to the position of the timber industry was certain to affect the already-existing contracts. That is not the case here. In the case before us, a ruling in favor of Southwestern Bell's position *might* adversely affect Taylor's position, but not necessarily. Taylor concedes this point in its arguments to this Court. First, in its brief, Taylor addresses the fourth requirement for intervention

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[7] 18 F.3d 1202 (5th Cir. 1994).

[8] *Id.* as 1207.

as of right, that the movants interests must be inadequately represented by the existing parties to the suit. In arguing that Time Warner could not adequately represent Taylor's interests, Taylor notes "[A]s a result of the difference in the negotiation postures of the respective interconnection agreements, Time Warner cannot assert certain claims and defenses available to Taylor."[9] In short, Taylor's agreement with Southwestern Bell is factually distinct from Time Warner's agreement with Southwestern Bell. It would be pure speculation to say that a judicial pronouncement as to the Time Warner case would necessarily affect Taylor's agreement with Southwestern Bell. Because the cases are factually different, the resulting application of existing law may necessitate a different result. Taylor's counsel conceded this point at oral argument, stating Taylor "might not be bound" by the district court's decision in this case. In essence, Taylor seeks to intervene as of right in litigation which Taylor concedes may have no impact on its contract with Southwestern Bell. Taylor has no such right.

Taylor relies on a second aspect of the *Espy* decision to support its theory of an interest in the underlying litigation. *Espy* states that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'"[10] Taylor emphasizes to this Court the language "involving as many apparently concerned persons," while ignoring the phrase "as is compatible with efficiency

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[9] Appellants Brief at 19.

[10] *Espy* at 1207 (internal citations omitted).

and due process." Taylor was not the only party seeking to intervene in this matter. Waller Creek Communications Co. also filed a motion to intervene. Further, an additional six telecommunications companies sought leave to participate as *amicus curiae*. This leaves the district court with no less than ten telecommunications companies, including Time Warner and Southwestern Bell, not to mention TPUC, all attempting to have their say in this litigation. Had these other companies sought to follow the route chosen by Taylor, each of these companies could seek to litigate different factual aspects of their individual contracts, as Taylor admittedly sought to do, in seeking to prevail. We fail to see how litigating nine different contracts simultaneously is compatible with efficiency and due process. The district court instead properly permitted the filing of *amicus* briefs. As the Seventh Circuit has noted:

> When should the prospect of an appellate decision cutting off further litigation in the circuit (or the nation as a whole, if the Supreme Court decides the case) be enough to support intervention? "Infrequency" is one response, an essential one if cases are to remain manageable. Trade associations, labor unions, consumers, and many others may be affected by (and hence colloquially "interested" in) the rules of law established by appellate courts. To allow them to intervene as of right would turn the court into a forum for competing interest groups, submerging the ability of the original parties to settle their own dispute (or to have the court resolve it expeditiously). Participation as *amicus curiae*

> will alert the court to the legal contentions of concerned bystanders, and because it leaves the parties free to run their own case is the strongly preferred option.[11]

In analyzing the facts of this case, we conclude that, unlike the appellants in the *Espy* case, Taylor's interest in the underlying litigation is too speculative and general to support intervention as of right.

Having determined that Taylor does not have an interest in the underlying litigation sufficient to meet the second requirement for intervention as of right, we need not address the third and fourth requirements outlined above.

Permissive Intervention

Taylor asserts that the district court abused its discretion in denying Taylor's motion for permissive intervention. Permissive intervention is governed by Federal Rule of Civil Procedure 24(b), which states in pertinent part: "Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Taylor contends that, because the motion to intervene

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[11] *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 532-533 (7th Cir. 1988).

was timely filed, granting the motion for permissive intervention will not unduly delay or prejudice the adjudication of the underlying litigation. One does not necessarily follow the other. In analyzing the issue of intervention as of right, we have discussed the manner by which a broad definition of "interest" can lead to unmanageable litigation. Our analysis of "undue delay" leads us to the same conclusion.

Taylor asserts that its negotiating posture in agreeing to the contract differs markedly from that of Time Warner. Taylor further asserts that it has claims and defenses with regard to its contract which are not available to Time Warner. Taylor makes these assertions based on a belief that the facts surrounding the Taylor contract are so different from those surrounding the Time Warner contract as to possibly bring about a different result. Yet at the same time, Taylor contends that intervening in the underlying litigation will not cause undue delay. Again, we cannot see how litigating facts that are wholly unrelated to the underlying litigation can be achieved without causing undue delay to the parties involved in the suit. In seeking to bring the litigation to an expeditious close, the district court did not abuse its discretion in denying Taylor's motion for permissive intervention.

Conclusion

The order of the district court denying Taylor's motion for intervention as of right, or, in the alternative, permissive intervention, is AFFIRMED.

APPENDIX B

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS MIDLAND-ODESSA DIVISION

[Filed: April 28, 1998]

No. MO-98-CA-43

SOUTHWESTERN BELL TELEPHONE COMPANY, *Plaintiff*,	)
v.	)
PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; JUDY WALSH; PATRICIA CURRAN; TIME WARNER COMMUNICATIONS OF AUSTIN, L.P.; TIME WARNER COMMUNICATIONS OF HOUSTON, L.P.; and FIBRCOM, INC., *Defendants*.	)

ORDER

BEFORE THE COURT, in the above-captioned cause of action, is Intervenor-Defendant Taylor Communications Group, Inc.'s Motion for Rehearing, filed April 28, 1998. After due consideration, the Court is of the opinion that the Motion should be denied.

Accordingly,

IT IS ORDERED that Intervenor-Defendant Taylor Communications Group, Inc.'s Motion for Rehearing is hereby DENIED.

SIGNED this 28 day of April, 1998.

/s/_____
HONORABLE LUCIUS D. BUNTON, III
SENIOR U.S. DISTRICT JUDGE

APPENDIX C

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

[Filed: April 14, 1998]

No. MO-98-CA-43

SOUTHWESTERN BELL TELEPHONE COMPANY,	)
	)
v.	)
	)
PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; JUDY WALSH; PATRICIA A. CURRAN; TIME WARNER COMMUNICATIONS OF AUSTIN, INC.; TIME WARNER COMMUNICATIONS OF HOUSTON, L.P.; and FIBRCOM, INC.,	)

ORDER ON TAYLOR COMMUNICATIONS GROUP, INC.'S MOTION TO INTERVENE

BEFORE THIS COURT, in the above-captioned cause of action, is Taylor Communications Group, Inc.'s Motion to Intervene, filed April 13, 1998. At this time, the Court is going to deny the Motion. This denial shall not severely prejudice Taylor Communications Groups, Inc. as it can file a similar Motion at a later time, if it so pleases. On April 16,

1998, the Court intends to hold a hearing concerning the Plaintiff's Motion for Preliminary Injunction, and the Court wants to deal with that issue first before it allows any intervention.

Accordingly,

IT IS ORDERED that Taylor Communications Group, Inc's Motion to Intervene is hereby DENIED.

SIGNED this 14 day of April, 1998.

/s/_____
HONORABLE LUCIUS D. BUNTON III
SENIOR U.S. DISTRICT JUDGE

APPENDIX D

DOCKET NO. 18975

COMPLAINT OF TAYLOR	§	PUBLIC UTILITY
COMMUNICATIONS	§	COMMISSION
GROUP, INC. AGAINST	§	
SOUTHWESTERN BELL	§	OF TEXAS
TELEPHONE COMPANY	§	

ORDER NO. 1
GRANTING TEMPORARY INJUNCTION; REQUIRING PARTIES TO COMPLY WITH TERMS OF INTERCONNECTION AGREEMENT DURING PENDENCY OF PROCEEDING

On March 5, 1998, Taylor Communications Group, Inc. (Taylor) filed a complaint and request for expedited ruling and interim ruling against Southwestern Bell Telephone Company (SWBT) for breach of the terms of the Taylor-SWBT interconnection agreement approved by this Commission. The undersigned Arbitrator has been designated the presiding officer in this docket.

Temporary Injunctive Relief

Taylor alleged in its verified complaint that:

> SWBT will disconnect Taylor's access lines beginning at 12:01 a.m. Monday, March 9, 1998. Such action is unlawful and will destroy Taylor's business. The disconnection will

> interrupt and cease telephone and/or Internet service to more than 10,000 individuals and businesses in Texas.

Taylor therefore requests a temporary injunction prohibiting SWBT from disconnecting its services during the pendency of this docket. The Arbitrator believes that good cause exists to grant the request for temporary injunction; Taylor has shown probable injury will result from SWBT's disconnection of Taylor's access lines and the emergency nature of the situation warrants expeditious action to preserve status quo. Accordingly, SWBT is hereby enjoined from disconnecting Taylor's access lines during the pendency of this docket, and shall continue to provide Taylor service under the same terms and conditions of the interconnection agreement as existed prior to the dispute.

Parties Must Comply With Terms and Conditions of Interconnection Agreement

The Arbitrator would note that the issue of whether the reciprocal compensation provision for the termination of local traffic in a SWBT interconnection agreement includes compensation for termination of SWBT's customers' calls to ISPs, has already been addressed by this Commission. The March 2, 1998 Commission Order in Docket No. 18082, *Complaint and Request for Expedited Ruling of Time Warner Communications*, required SWBT to compensate Time Warner Communications (TW Comm) under the terms of the reciprocal compensation provisions for local calls that terminate to TW Comm customers, including such customers that are ISPs. The Arbitrator is troubled by SWBT's unilateral decision to refuse payment of reciprocal

compensation, especially in light of the Commission's decision in Docket No. 18082.

Accordingly, both SWBT and Taylor are ordered to adhere to the terms and conditions of the interconnection agreement during the pendency of this docket; to wit, (1) SWBT shall provide reciprocal compensation to Taylor for local traffic, including connections made to Internet Service Providers (ISPs) on Taylor's lines, and (2) Taylor shall compensate SWBT for access service. Any "true up" of funds necessary shall be made at the conclusion of this proceeding.

Procedural matters in this docket, including scheduling, shall be addressed by separate order.

SIGNED AT AUSTIN, TEXAS the 16th day of March, 1998.

PUBLIC UTILITY COMMISSION OF TEXAS

/s/_____
KATHERINE D. FARROBA
ARBITRATOR

Orders Issued by Public Utility Commission of Texas

DOCKET NO. 18975

COMPLAINT OF TAYLOR	§	PUBLIC UTILITY
COMMUNICATIONS	§	COMMISSION
GROUP, INC. AGAINST	§	
SOUTHWESTERN BELL	§	OF TEXAS
TELEPHONE COMPANY	§	

ORDER NO. 2

GRANTING MOTION FOR RECONSIDERATION AND PARTIALLY VACATING ORDER NO. 1; DENYING MOTION TO DISMISS; REQUESTING PARTY POSITIONS CONCERNING THE EXISTENCE OF ANY FACT ISSUES AND ISSUING ORDER ON THRESHOLD BRIEFING

I. Order Partially Vacating Order No. 1

On March 19, 1998, Southwestern Bell Telephone Company (SWBT) filed its Motion for Reconsideration and to Vacate and Motion to Dismiss and Answer. In that motion, SWBT requests that the Arbitrator reconsider and vacate Order No. 1 that requires SWBT and Taylor Communications Group, Inc. (Taylor) to pay each other reciprocal compensation for Internet service provider (ISP) traffic and grants a temporary injunction preventing SWBT from disconnecting Taylor's access lines during the pendancy of this docket. Taylor did not respond to SWBT's motion by the 3:00 p.m., March 27, 1998, deadline established per P.U.C. Proc. R. § 22.326. In the interest of clarifying Order No. 1, the Arbitrator is issuing this order without the benefit of a response from Taylor.

The Arbitrator notes that a final legal determination as to the proper interpretation of the SWBT/Taylor agreement is not appropriate without further proceedings. Therefore,

* It is clarified that the decision in Order No. 1, that (1) SWBT shall provide reciprocal compensation to Taylor for local traffic, including connections made to Internet Service Providers (ISPs) on Taylor's lines, and (2) Taylor shall compensate SWBT for access service, shall be interim only; and

* Such payments shall remain subject to "true up" depending on the conclusion made in this proceeding.

With respect to this compensation issue, the Arbitrator strongly encourages the parties to negotiate an interim solution pending final disposition of this docket.

The Arbitrator also notes that prior to the granting of the temporary injunction SWBT agreed to not disconnect Taylor's access lines during the pendency of this docket. However, SWBT's agreement did not come to the Arbitrator's attention until after Order No. 1 was issued. Given that SWBT and Taylor voluntarily reached an accommodation whereby no disconnection or disruption of service will take place, the Arbitrator vacates the temporary injunction.

II. Denial of Motion to Dismiss

The Commission in Docket No. 18082 held that the determination as to whether ISP traffic is local is a subject matter within the Commission's jurisdiction.[12] Therefore, SWBT's Motion to Dismiss is denied.

III. Request for Statements Concerning the Existence of Any Disputed Facts

Parties shall file statements concerning the existence of any disputed facts which need to be resolved in this proceeding. Parties shall also endeavor to file a stipulated statement of facts for all relevant facts to which they agree. The fact statements shall be filed by April 7, 1998.

IV. Briefing of Threshold Issue

Taylor and SWBT disagree as to whether ISP traffic is subject to reciprocal compensation pursuant to their interconnection agreement. The question underlying this dispute is whether ISP traffic is, for purposes of the parties' interconnection agreement, local or interexchange traffic. To address this issue, SWBT and Taylor shall file briefs addressing the threshold issue and to the extent, if at all, the facts and/or legal/policy considerations in this docket differ from Docket No. 108082. The briefs are due on April 6, 1998. Reply briefs are due April 10, 1998.

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[12] *Complaint and Request For Expedited Ruling Of Time Warner Communications*, Docket No. 18082, Final Order (March 2, 1998).

After reviewing the statements regarding factual issues and the briefs on threshold issues, the Arbitrator will either issue an award resolving the issues on legal/policy grounds or issue a procedural order that schedules additional proceedings.

SIGNED AT AUSTIN, TEXAS the 27th day of March, 1998.

PUBLIC UTILITY COMMISSION OF TEXAS

/s/_____
KATHERINE D. FARROBA
ARBITRATOR

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: May 14, 1999]

No. 98-50528

Appeal From The United States District Court
For The Western District of Texas, Midland

TAYLOR COMMUNICATIONS GROUP, INC.,
Appellant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Plaintiff-Appellee,

v.

PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; JUDY WALSH; PATRICIA CURRAN; TIME WARNER COMMUNICATIONS OF AUSTIN, L.P.; TIME WARNER COMMUNICATIONS OF HOUSTON, L.P.; and FIBRCOM, INC.,
Defendants-Appellees.

ON PETITION FOR REHEARING

Before: WISDOM, STEWART and DENNIS,
Circuit Judges.

PER CURIAM:

IT IS SO ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/_____
John Wisdom
United States Circuit Judge

APPENDIX F

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS MIDLAND-ODESSA DIVISION

[Filed: April 1, 1998]

No. MO-98-CA-43

SOUTHWESTERN BELL TELEPHONE COMPANY, *Plaintiff*,	)
v.	)
PUBLIC UTILITY COMMISSION OF TEXAS; ET AL. *Defendants*.	)

PLAINTIFF SOUTHWESTERN BELL TELEPHONE COMPANY'S APPLICATION FOR PRELIMINARY INJUNCTION AND SUPPORTING BRIEF

* * * * *

[Page 30]

2. In addition to the economic injury that paying Time Warner may cause to Southwestern Bell, other companies may argue that, under the 1996 Act and the most-

favored-nations provisions of their agreements, they are entitled to adopt the same interconnection terms that Time Warner is currently receiving. *See* 47 U.S.C. §252(i). Indeed, that has already occurred. Carriers have asked the PUC to order Southwestern Bell to give them the same "contract" the PUC has imposed on Southwestern Bell in these proceedings. *See* Appendix C, Exhibits C-2, C-3, C-4 and C-5. Moreover, one PUC arbitrator has treated the result in this case as though it were a ruling of general applicability or agency precedent, under which "local traffic" in other agreements now must be interpreted in the manner newly announced by the PUC. *See* Exhibit C-2 (**decision granting Taylor Communications "Time Warner" relief**) and Exhibit C-3 (subsequent order modifying that decision). (Emphasis added.)

These actions magnify enormously the threat of irreparable injury to Southwestern Bell. Data developed before the arbitration based on 1997 traffic patterns and on fewer than a half-dozen interconnection agreements indicated that Southwestern Bell could be required to pay other carriers from $25 to $30 million each year if the phrase "local traffic" were redefined to include Internet calls. Attachment 3, Tab A (Cooper), at 14 n. 14. Calculations based on the present number of interconnection agreements indicates that Southwestern Bell faces losing approximately $40 million each year if current traffic patterns remain unchanged. If, however, LSPs adopt methods to encourage ISPs to have their customers keep connections to the Internet "open" for longer each day, Southwestern Bell could lose as much as $60 million each year. *See* Affidavit of Paul Cooper, Exhibit D-1.

3. Southwestern Bell also faces a substantial risk of losing customers who are Internet service providers. Although other local carriers are unregulated and can raise or lower prices at will, Southwestern Bell cannot selectively favor any particular ratepayer or group of ratepayers.

* * * * *

[Page 33]

CONCLUSION AND PRAYER FOR RELIEF

As shown, Southwestern Bell is likely to succeed on the merits of its claims and has raised substantial legal questions. Moreover, Southwestern Bell faces an imminent threat of irreparable injuries, and granting injunctive relief is supporting by a balancing of the equities and would not disserve the public interest.

WHEREFORE, as relief for the harms alleged herein, Southwestern Bell requests that this Court enter a preliminary injunction

(1) temporarily enjoining and staying the PUC's Final Order in Docket 18082; and

(2) pending final judgment, temporarily enjoining the PUC, the Commissioners, Time Warner and **anyone acting in concert with any of them** (a) from enforcing or attempting to enforce the PUC's decisions, (b) from applying it in other cases as a "rule" of decision, as a precedent of the PUC in its role as a federal arbitrator, or as an order of

general applicability, and (c) from allowing other carriers to claim the benefits of the PUC's Final order either as "precedent" affecting their negotiations or contracts, or on the theory that they can claim the benefits of that order under "most favored nations" provisions of their own contracts or pursuant to the 1996 Act. (Emphasis added.)

APPENDIX G

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

[Filed: March 19, 1998]

No. MO-98-CA-43

SOUTHWESTERN BELL TELEPHONE COMPANY, *Plaintiff*,	)
v.	)
PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; JUDY WALSH; PATRICIA CURRAN; TIME WARNER COMMUNICATIONS OF AUSTIN, L.P.; TIME WARNER COMMUNICATIONS OF HOUSTON, L.P.; and FIBRCOM, INC., *Defendants*.	)

SOUTHWESTERN BELL TELEPHONE COMPANY'S ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

Southwestern Bell Telephone Company ("Southwestern Bell") brings this its Original Complaint for Declaratory and Injunctive Relief, alleging as follows:

* * * * *

[Southwestern Bell's Original Complaint — Page 29]

(c) declare that Time Warner is bound by the contracts it executed, which did not include Internet calls within local traffic, or, alternatively, that Southwestern Bell is entitled to rescind and abrogate any and all portions of the Southwestern Bell/Time Warner agreements that define "local" traffic subject to termination charges to include Internet calls, because Time Warner's fraudulent concealment of its interpretation of "local" resulted in fraudulent inducement and/or a palpable unilateral mistake;

(d) permanently enjoin the PUC's decision classifying Internet calls as local and the PUC's order that Southwestern Bell pay termination charges for such traffic, and temporarily, pending trial, and thereafter permanently enjoin the PUC, the Commissioner, Time Warner and **anyone acting in concert with them from enforcing or attempting to enforce the PUC's decisions**; and

(e) grant such other relief as may be sought by Southwestern Bell in further pleadings and as may be appropriate in this case. (Emphasis added.)

Signed on this the 19th day of March, 1998.

APPENDIX H

SIERRA CLUB v. ESPY,
18 F.3d 1202 (5th Cir. 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Texas Forestry Association ("TFA") and the Southern Timber Purchasers Council ("STPC"), two trade associations representing most of the purchasers of timber from the Texas national forests, appeal the district court's denial of their motion to intervene in this lawsuit between the Sierra Club and the Secretary of Agriculture. Concluding that movants satisfied the requirements of Fed. R. Civ. P. 24(a) for intervention as a matter of right, we reverse.

I.

Three environmentalist groups initiated a lawsuit in 1985 to challenge certain United States Forest Service practices for managing the four national forests in Texas. The initial complaint alleged that the Forest Service's program for controlling the southern pine beetle was in violation of the Wilderness Act, 16 U.S.C. §§ 1131-1136, the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1543, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4361. The district court denied the requested relief but issued a preliminary injunction requiring the Forest Service to adhere to its own prescribed policies for controlling the pine beetle. *See Sierra Club v. Block*, 614 F.Supp. 134,

135, 139-41 (E.D. Tex. 1985).

In 1987, the Forest Service issued the "Texas Forest Plan" (the "Plan") based upon an environmental impact statement ("EIS"). The plaintiffs amended their complaints to allege that the Plan violated the ESA, NEPA, and the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq.*, in addition to their claims concerning the pine beetle. Because the plaintiffs' administrative appeals of the Plan were pending, the district court dismissed the Plan-related claims. *See Sierra Club v. Lyng*, 694 F.Supp. 1256, 1259 (E.D.Tex.1988). The court entered a permanent injunction, however, with regard to ESA violations that were not related to the Plan. *See Sierra Club v. Lyng*, 694 F.Supp. 1260 (E.D.Tex.1988). This court affirmed the finding of ESA violations but vacated portions of the injunction to give the Forest Service the opportunity to formulate its own plan to comply with the ESA. *See Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

In 1990, one plaintiff, the Texas Committee on Natural Resources ("TCONR"), filed a third amended complaint to address pine beetle issues. In 1992, TCONR filed its fourth amended complaint, which included Plan-related claims, challenging the Plan and the Plan EIS. The magistrate judge recommended that the government's motion for summary judgment be granted and the plaintiffs' NFMA and NEPA claims be dismissed. On January 6, 1993, TCONR filed its objections to the magistrate judge's report and moved for an "urgent injunction" barring the Forest Service from proceeding with timber sales in various parts of the Texas national forests.

On May 12, 1993, the district court granted TCONR's motion, issuing a preliminary injunction against even-aged logging[1] and rejecting the magistrate judge's conclusion that the Forest Service had complied with NFMA and NEPA on these timber sales. *See Sierra Club v. Espy*, 822 F.Supp. 356, 370 (E.D.Tex.1993). On June 24, 1993, the Forest Service issued a letter advising prospective timber purchasers that, as a result of the injunction, it would refrain from offering not only the planned timber sales challenged by the plaintiffs but also any timber sales with even-aged regeneration cuts. This letter triggered TFA and STPC's motion to intervene on July 9, 1993, which was denied.

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[1] Even-aged management is one of two systems of forest management defined in a Forest Service regulation, 36 C.F.R. § 219.3 (1992). Even-aged management creates stands where trees of essentially the same age class grow together. *Id.* Even-aged stands can be produced naturally (e.g., by fires or insect infestations) or by timber harvesting methods that remove most of the stand in one cutting (e.g., clearcut, shelterwood, or seed tree cutting methods). *Id.* Although most of the tree cover is temporarily removed under the even-aged cutting method, NFMA allows timber harvesting only when the stand can be adequately restocked within five years after harvest. 16 U.S.C. § 1604(g)(3)(E)(ii); 36 C.F.R. § 219.27(c)(3).

Uneven-aged management, on the other hand, through single-tree and group selection, results in the growth of trees through a range of diameters or age classes, maintaining continuous high-forest cover. 36 C.F.R. § 219.3. Even-aged management mimics natural ecosystems, whereas widespread uneven-aged management in natural ecosystems has been called "ecologically unsound." *Resources Ltd., Inc. v. Robertson*, 789 F.Supp. 1529, 1539 (D.Mont.1991), *aff'd in part, rev'd in part*, 8 F.3d 1394 (9th Cir. 1993j).

II.

Movants argue that the district court erred in refusing to allow their intervention as a matter of right under Fed.R.Civ.P. 24(a). A party seeking to intervene as of right must satisfy four requirements: (1) The application must be timely; (2) the applicant must have an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.) (en banc) (quoting *International Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978)), *cert. denied*, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984). If a party seeking to intervene fails to meet any one of those requirements, it cannot intervene as a matter of right. *Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285, 1287 (5th Cir.), *cert. denied*, 484 U.S. 817, 108 S.Ct. 72, 98 L.Ed.2d 35 (1987). TFA and STPC's right to intervene is a legal issue that we review *de novo*. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202 (5th Cir. 1992).[2]

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[2] Although the timeliness of intervention is generally reviewed for abuse of discretion, *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923, 926 (5th Cir. 1984) (en banc), where the district court makes no finding regarding timeliness, we review this factor *de novo*. *Ceres Gulf*, 957 F.2d at 1202 n. 8. We agree with the movants that *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, — U.S. —, 114 S.Ct. 878, 127 L.Ed.2d 74 (1994), is inapposite. There the court

A.

Movants argue that their motion to intervene was timely. Determining the timeliness of a motion to intervene entails consideration of four factors: (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1997) (citations omitted).

The analysis is contextual; absolute measures of timeliness should be ignored. *Id.* at 266 (citation omitted). The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970) (citation omitted). Federal courts should allow intervention "where no one would be hurt and greater justice could be attained." *Id.* (citation omitted).

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denied intervention where the lack of timeliness was obvious.

The movants argue that the first factor supports intervention because they promptly moved for intervention once their interest in the case became apparent, i.e., after the preliminary injunction was issued on May 12, 1993. The lawsuit, although pending for eight years, did not raise the NFMA and NEPA claims with regard to the Plan until the fourth amended complaint was filed in May 1992. Even in 1992, movants argue, the TFA and STPC believed that their interests would not be adversely affected, given the magistrate judge's report recommending that the NFMA and NEPA claims be dismissed.

Not until the district court granted the preliminary injunction did the movants become aware that their interests in timber sales were affected. TFA and STPC moved to intervene within two months of the issuance of the preliminary injunction.

The plaintiffs contend that the movants should have become aware in 1987 of any interest they had concerning timber sales because the NFMA and NEPA claims were first raised in the second amended complaint. The district court indicated that it would carry the NFMA and NEPA claims in January 1988, pending exhaustion of administrative remedies. Furthermore, TFA participated as amicus curiae in the 1989 appeal of the decision concerning even-aged management under the ESA. Plaintiffs conclude that the NFMA and NEPA claims have been present for six years and that the movants' interest in these issues has remained unchanged during that time.

Having reviewed the January 1988 district court opinion, we conclude that the status of the NFMA and NEPA

claims changed dramatically over the course of the lawsuit. In its January 1988 opinion, the district court dismissed TCONR's claim relating to the land and resource management plan. *See Sierra Club v. Lyng*, 694 F.Supp. 1256, 1259 (E.D.Tex.1988). Furthermore, the district court denied Sierra Club's motion to amend its complaint to allege noncompliance with NFMA, pending exhaustion of administrative remedies. *Id.* at 1260. Therefore, TFA and STPC had reason to believe that their interests were not adversely affected at that stage.

In *Stallworth*, 558 F.2d at 264, we rejected the notion that the date on which the would-be intervenor became aware of the pendency of the action should be used to determine whether it acted promptly. Courts should discourage premature intervention that wastes judicial resources. *Id.* at 265. A better gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties. *Id.* at 264.

In this case, the movants legitimately believed that the Forest Service would defend its timber sales and planning. When the agency announced on June 24, 1993, that it would apply the preliminary injunction to all timber sales (not merely the nine sales challenged by the plaintiffs), movants became aware that the Forest Service would not protect their interests. Therefore, we conclude that the first factor — the length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene — weighs in favor of the movants.

2.

The second factor — the extent of prejudice to the existing parties as a result of the applicant's delay in seeking intervention — also weighs in favor of TFA and STPC. Plaintiffs argue that TFA and STPC's participation in the proceedings would "severely protract the litigation." But prejudice must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation. *Id.* at 265. The movants sought intervention less than three weeks after the Forest Service issued its June 24, 1993, letter. We therefore conclude that no prejudice to the existing parties resulted from the delay in seeking intervention.[3]

3.

The third factor is the extent of the prejudice the would-be intervenor would suffer if its petition for leave to intervene were denied. Movants argue that the preliminary injunction substantially reduced the acreage available for timber production and foreclosed the agency from offering any more timber sales with even-aged management regeneration cuts in the Texas national forests. The movants' member companies purchase and process timber offered from these forests and have property interests in existing sales contracts.

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[3] Moreover, as movants admit, no prejudice can come from renewed discovery or pretrial proceedings, because an intervenor "must accept the proceedings as he finds them." *In re Geisser*, 554 F.2d 698, 705 n. 6 (5th Cir. 1997). The intervenor has no right to relitigate issues already decided. *Id.*

Plaintiffs claim that TFA and STPC are not prejudiced by denial of intervention because they already have intervened in the Forest Service's appeal of the preliminary injunction, and through that appeal movants could argue for their interpretation of NFMA and NEPA. Furthermore, since the movants participated in the development of the Forest Service's land management plan, they can continue to influence the timber industry. Finally, plaintiffs assert that no sales contracts are affected, and movants have failed to show how reduction of acreage adversely affects their interest.

The intervention in the appeal of the district court's preliminary injunction cannot adequately substitute for intervention at the district court level, as many more issues are at stake in the district court than the single issue now on appeal. The claim that the movants' interests are adequately represented by their participation in the development of the Forest Service's land management ignores the legal rights associated with formal intervention, namely the briefing of issues, presentation of evidence, and ability to appeal.

Finally, it is obvious that the economic interests of the movants are at stake. The movants have a financial interest in the ability to use the less expensive even-aged harvesting methods, and they have prospect of injury if the Forest Service cannot deliver constant volumes of timber. Furthermore, the district court's holding that NFMA bars even-aged management could injure movants' member companies in other venues.

4.

The final factor in determining timeliness of the

intervention is the existence of unusual circumstances militating either for or against a determination that the application is timely. We are aware of no such specific circumstances pertinent to this case. In summary, based upon the brief time that had elapsed between the Forest Service's June 24, 1993, letter and the motion for intervention, the remoteness of prejudice to the existing parties resulting from this delay, and the likelihood of prejudice to the movants if intervention were denied, we conclude that the motion to intervene was timely.

B.

The second requirement for intervention as a matter of right under rule 24(a) is that the applicant have an "interest" in the subject matter of the action. This interest must be "direct, substantial, [and] legally protectable." *Piambino v. Bailey*, 610 F.2d 1306, 1321 (5th Cir.) (citations omitted), *cert. denied*, 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980). Plaintiffs claim that the movants' interest is too speculative and generalized to satisfy rule 24. We disagree.

Movants represent the forest products industry, including the major purchasers and processors of Texas national forest timber. These member companies have legally protectable property interests in existing timber contracts that are threatened by the potential bar on even-aged management. Since "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process," *Ceres Gulf*, 957 F.2d at 1203 n. 10 (citation omitted), we conclude that movants had an interest sufficient to satisfy rule 24.

C.

The third requirement of rule 24(a) is that the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect his interest. Plaintiffs argue that adverse *stare decisis* effects will not supply the requisite disadvantage to satisfy this test. As we have stated in *Ceres Gulf, id.* at 1204, however, an intervenor's interest "is impaired by the *stare decisis* effect of the district court's judgment." The issue of whether the NFMA bars even-aged logging affects the movants and, because of the precedential effect of the district court's decision, an adverse resolution of the action would impair their ability to protect their interest.

D.

The final requirement for intervention as a matter of right is that the applicant's interest must be inadequately represented by the existing parties to the suit. The applicant has the burden of demonstrating inadequate representation, but this burden is "minimal". *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636, 30 L.Ed.2d 686 (1972). The applicant need only show that representation "may be" inadequate. *Id.*

Plaintiffs contend that the government adequately represents the movants' interest because the interests are essentially identical. We cannot agree with this position. The movants have demonstrated, through the June 24, 1993, letter applying the district court's preliminary injunction to all future timber sales, that the government's representation of their interest is inadequate. The government must represent

the broad public interest, not just the economic concerns of the timber industry. Given the minimal burden on the movants to satisfy this requirement, we conclude that the government's representation of the intervenor's interest is inadequate.

E.

Applying the four requirements of rule 24(a), we must conclude that the movants were entitled to intervene as a matter of right. Their motion was timely and indicated a legitimate interest in the subject matter. Moreover, failure to allow intervention would impair TFA and STPC's ability to protect their interest because of the precedential effect of the district court's decisions. We also agree with the movants that the government's representation of their interest is inadequate.

III.

Because we conclude that the district court, in spite of its diligent and evenhanded effort to manage this difficult and complex case, erred in denying rule 24(a)(2) intervention, we need not reach the issue of permissive intervention. The order denying intervention is REVERSED.

APPENDIX I

NEUSSE v. CAMP,
385 F.2d 694 (1967)

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. . . branch banking was concerned." *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966). The technique Congress has used to guarantee this competitive equality and identity of opportunity between state and national banks is the adoption of state rules on branching.[6] In the *Walker Bank* case, the Supreme Court expressly held that state law controls on all questions of branching by a national bank, not only "when" and "where" a bank may branch, but also by what "method".

In refusing the application for intervention, the District Court accepted the arguments of the Comptroller and the intervening national bank that the only issue involved in the pending action is the construction of the definitional section of the National Bank Act. If section 36(h) is so construed that a branchable Wisconsin savings and loan association is an "institution" "carrying on banking business", the Comptroller would apparently prevail on the merits. To agree that the

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[6] *See Commercial State Bank of Roseville v. Gidney*, 174 F.Supp. 770 (D.D.C. 1959), aff'd on opinion below, *Gidney v. Commercial State Bank of Roseville*, 108 U.S.App.D.C. 37, 278 F.2d 871 (1960), in which we approved Judge Youngdahl's conclusion that state banks had standing to sue the Comptroller.

ultimate question is the meaning of a federal statute, however, does not mean that the state banking commissioner has no "interest" in how that question is answered. For on this interpretation rests a large part of the advancement of the Congressional policy of competitive equality between state and national banks. Where Congress has been most deliberate in promoting a policy of equal opportunity by adopting state law on the subject, we think the courts may not be insensitive to the request by the official charged with administering the state's banking laws to appear as a party to urge the construction of the federal statute that he claims is necessary to secure the state's interests, and hence the congressional objectives.

The Supreme Court's most recent expression of intervention policy appears in *Cascade Natural Gas Corp. v. El Paso National Gas Co.*, 386 U.S. 129, 135, 87 S.Ct. 932, 17 L.Ed.2d 814 91967), reversing *United States v. El Paso National Gas Co.*, 37 F.R.D. 330 (D.Utah 1965). The Court rules that the State of California was entitled to intervene as of right in proceedings on remand when "protection of California interests in a competitive system was at the hart of our mandate directing divestiture." We hold that where protection of the competitive equality of state banks is the core of the federal statute controlling the branching of national banks, a state banking commissioner has an adequate interest in the construction of the federal act to justify intervention.

B. *The Impairment of the Commissioner's Interest as a Practical Matter*

Prior to the 1966 amendment of Rule 24, the Commissioner would probably not have been entitled to

intervene in this action, for the pre-amendment Rule required that the applicant might be "bound" by the judgment in the pending action and the prevailing weight of authority interpreted this test to mean bound in the res judicata sense. *See, e.g., Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961). The changes wrought in Rule 24(a) have repudiated that narrow approach in general, and *Sam Fox* in particular. The Rule now specifies only that the "disposition of the action may as a practical matter impair or impede his ability to protect" the applicant's interest. This alteration is obviously designed to liberalize the right to intervene in federal actions. Interestingly, an earlier draft would have required that the judgment "substantially" impair or impede the interest, but that higher barrier was deleted in the course of approving the amendment. *See Cohn, The New Federal Rules of Civil Procedure*, 54 Geo.L.J. 1204, 1232 (1966).

We think that under this new test *stare decisis* principles may in some case supply the practical disadvantage that warrants intervention as of right. We join, therefore, in the analysis recently presented by Judge Brown in *Atlantis Development Corp. v. United States*, *supra*, 379 F.2d 818, at 826-829.

We need not and do not consider how far this doctrine rightly extends. In the case at bar, a question of first impression is being presented that will involve a decision whether terms in the National Bank Act mean that the Comptroller of the Currency may authorize a national bank (not a federal savings and loan association) to branch where the laws of the State of Wisconsin would not permit a state bank to branch (although they would permit a state savings

and loan to do so). The Commissioner would not be precluded by res judicata from relitigating this question if an unfavorable answer is rendered in his absence. But even under the former rules, the opportunity to raise the same issue in another forum was no bar to intervention as of right,[7] and we may expect that a decision by the District Court here, the first judicial treatment of this question, would receive great weight, whether the question arose again in this jurisdiction or in the federal court in Wisconsin. Should this court on appeal render a decision in the Commissioner's absence, and contrary to his view, he would presumably be hampered in seeking to vindicate his approach in another court. He might retain the hope of sparking a conflict between circuits, and possibly even Supreme Court resolution. At least in part, it is this fragmented approach to adjudication that the revitalized federal rules seek to avoid. In fairness to their spirit, we think we must recognize the practical consequences of the "failure to allow [the Commissioner] an opportunity to advance [his] own theories both of law and fact in the trial (and appeal) of the pending case." *Atlantis Development Corp. v. United States*, *supra*, 379 F.2d 818, at 828-829.[8]

And in this context it is significant that the District Court

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[7] *Clark v. Sandusky*, 205 F.2d 915, 919 (7th Cir. 1953).

[8] In *Mitchell v. Singstad*, 23 F.R.D. 62 (D.Md.1959), Judge Thomsen allowed intervention by a state road commissioner in a Fair Labor Standards Act proceeding between the U.S. Secretary of Labor and road engineers under contract to the state. Even in the absence of any contention that the state would be liable over for additional wages, Judge Thomsen reasoned that a finding that such work was covered by the federal act would affect the state's road construction projects in the future by increasing costs.

denied a motion for summary judgment on the merits of this case, on the ground that even though the issue is one of statutory construction, and thus one of "law", the nature of the dispute is such that evidence might be helpful in arriving at an interpretation.

C. *Representation of the Commissioner's Interest May Not Be Adequate*

The Commissioner's right to intervene as a party depends also on whether his interest is adequately represented by existing parties. *See generally* Annot., 84 A.L.R.2d 1412 (1962). The prior text of Rule 24 spoke in terms of whether representation by existing parties "is or may be inadequate". The present rule provides for intervention "unless the applicant's interest is adequately represented by existing parties."

While the change in wording does not relate to any change in standard as such, it underscores both the burden on those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention.

Little guidance for the present case is furnished by the discussion in the pre-amendment cases which focused on such indicia of inadequacy as collusion between the parties, a conflict in position urged, or an indication that the alleged

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> term is used, its relation to other cognate terms and many other similar matters that may well be conceived.

In adducing evidence on this issue, the state banking commissioner may be in a better position than a single state bank to provide full ventilation of the legal and factual context of this critical definition.

We hold that there is a serious possibility that the Commissioner's interest may not be adequately represented by any existing party, and that he is entitled to participate as a party and not merely as a friend of the court.[10]

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[10] The applicant is often relegated to the status of *amicus curiae* when intervention is properly denied. *See, e.g., Durking v. Pet Milk Co.*, 14 F.R.D. 374, 381 (W.D.Ark.1953). But this is not an adequate substitute for participation as a party. Although specific provision may be made for full participation at the trial (see note 3), generally, as has been elsewhere noted, an amicus "may not tender any evidence, make any motions, or take or prosecute an appeal." Holtzoff, *Entry of Additional Parties in a Civil Action*, 31 F.R.D. 101, 102; *cf. Justice v. United States*, 365 F.2d 312, 314 (6th Cir. 1966).

Of course, even where the interests of a person may have been adequately represented at trial, failure to take an appeal from an adverse judgment may introduce the element of inadequacy, entitling the interested person to intervene after judgment to file an appeal. *Wolpe v. Poretsky*, 79 U.S.App.D.C. 141, 144 F.2d 505, *cert. denied* 329 U.S. 724, 65 S.Ct. 190, 89 L.Ed. 621 (1944); *Zuber v. Allen*, No. 20,931 (D.C.Cir.July 5, 1967).

Since the commissioner met all three criteria for intervention as of right under Rule 24(a), it was error to deny him that right.

II. PERMISSIVE INTERVENTION

We think the District Court should have granted the alternative motion seeking permissive intervention under Rule 24(b). While reversal of the denial of permissive intervention is not often warranted, there is undoubted jurisdiction to enter such an order where the District Court has not followed the appropriate standard or approach in exercising its discretion. *See Textile Workers Union v. Allendale Co.*, *supra*, 96 U.S.App.D.C. at 405-06, 226 F.2d at 769-70.

Rule 24(b), not amended in 1966, provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact. In the present case the legal issues are the same. Although the rule speaks in terms of a "claim or defense" this is not interpreted strictly so as to preclude permissive intervention. In Professor Moore's phrase, quoted with approval in *Allendale*, intervention has been allowed in situations where "the existence of any nominate 'claim' or 'defense' is difficult to find."[11] While permissive intervention may be denied in order to avoid the likelihood of undue delay, here the District Court's denial of intervention was not put on that ground;[12]

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[11] 4 J. Moore, *supra* note 2, ¶ 24.10, at 60.

[12] The District Court denied intervention on the ground that the "governing rule" was that stated by Judge Kent in *Merchants & Miners Bank v. Saxon*, cited note 1, a decision

it is not seriously argued by appellees[13] and the factual situation does not support it.

It is a significant fact that the applicant for permissive intervention is a government official. Rule 24(b) was expressly amended in 1946 so as to permit intervention by a state or federal governmental official charged with administering a state statute or regulation on which any party relies for his claim or defense.[14] The amendment was added to . . .

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denying intervention solely for a lack of interest.

[13] Appellees only quote the general consideration that "additional parties always take additional time." *See Stadin v. Union Elec. Co.*, 309 F.2d 912, 920 (8th Cir. 1962), *cert. denied* 373 U.S. 915, 83 S.Ct. 1298, 10 L.Ed.2d 415 (1963).

[14] The second sentence of Rule 24(b) now provides: "When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation,

APPENDIX J

JENKINS BY AGYEI v. THE STATE OF MISSOURI,
967 F.2d 1245 (8th Cir. 1992)

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Icelean Clark *et alia* appeal from the district court's approval of a partial settlement in the Kansas City school desegregation case, *Jenkins v. Missouri*, No. 77-0420-CV-W-4. On July 23, 1990, the district court approved an agreement of the parties to the suit whereby the tax on property within the Kansas City, Missouri, School District would be raised $.96 per $100 of assessed valuation to pay for salary increases for KCMSD employees. The Clark group consists of various property owners within the district who object to the decision to raise taxes in this way. Before we can reach the propriety of the settlement, we must first decide whether this appeal lies, since there is question as to whether the Clark group filed an effective notice of appeal. As we conclude that it did not, we need not consider the substantive questions here presented. We dismiss the appeal.

The chronology of events leading up to this appeal is crucial to our holding. On July 3, 1990, the district court entered an order announcing a proposed settlement by the parties to the *Jenkins* litigation of certain issues involving KCMSD employee salary raises and a $.96 property tax increase that would be levied in the district, in part to fund the

salary increases. The court held a hearing on the proposed settlement on July 17 and the Clark group's counsel argued against the settlement at the hearing. The district court approved the settlement on July 23, and the Kansas City school board actually voted to levy the tax on August 20.

On August 22, within the thirty day period for filing a notice of appeal, Fed. R. App. P. 4, the Clark group filed such a notice. At that point not only were they *not* parties to the suit, but they had not moved to intervene. On August 28, they finally moved to intervene "for the limited purpose of seeking appellate review of the July 23, 1990 order." The district court granted their motion on October 23, 1990, stating that the Clark group was entitled to intervene as of right under Fed.R.Civ.P. 24(a)(2) since under the settlement they would suffer a pecuniary loss and since no party to the action adequately represented the taxpayers' interests. Order of Oct. 23, 1990, slip op. at 206. The district court held that the motion to intervene was timely, stating that "once final judgment was entered, the taxpayers had a legal interest which satisfied the requirements of Rule 24." *Id.* at 6.

About the time the district court granted the motion to intervene, this court dismissed the Clark group's appeal for lack of jurisdiction because the would-be appellants were not parties to the *Jenkins* suit. Order of October 26, 1990. The Clark group sought rehearing and filed a second notice of appeal on November 23, 1990, some four months after the order appealed from. We obtained additional briefing and heard oral argument on the jurisdiction issue and the merits of the appeal.

We conclude that our initial assessment of the matter was correct — that no effective notice of appeal has been filed to confer jurisdiction on the court. When the Clark group filed its first notice of appeal, its members were not parties to this suit and had not even asked to become parties. "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 587, 98 L.Ed.2d 629 (1988) (per curiam). *Accord Karcher v. May*, 484 U.S. 72, 77, 108 S.Ct. 388, 392, 98 L.Ed.2d 327 (1987); *United States v. City of Oakland*, 958 F.2d 300, 301-02 (9th Cir.1992).

There are some exceptions to this rule; for instance, a non party may appeal an injunction that purports to bind the non party, *Thompson v. Freeman*, 648 F.2d 1144, 1147 n. 5 (8th Cir.1981). *See generally* 9 James W. Moore et al., Moore's Federal Practice ¶203.06 (2d ed. 1991). The Clark group does not argue that any exception to the rule makes intervention unnecessary. The group does, however, cite to *Baker v. Wade*, 769 F.2d 289 (5th Cir.1985) (en banc), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3337, 92 L.Ed.2d 742 (1986), in which a member of a defendant class was permitted to appeal a judgment after the class representative abandoned its appeal on behalf of the class. *After* filing his notice of appeal as a non party, the class member moved for, and was granted, intervenor status in the Court of Appeals, and the Fifth Circuit decided the appeal on the merits. 769 F.2d at 291-92. *Wade* is distinguishable from this case, since a party had initiated the appeal. Judge Rubin's dissent in *Wade* points out that the majority did not hold that the non party class member's appeal was properly lodged, but rather that he

would be permitted to intervene in the appeal first lodged, then abandoned by the class representative. 769 F.2d at 295. There was no underlying appeal in this case for the Clark group to intervene in; and, in any case, we are not persuaded that the *Wade* case was correctly decided, for reasons stated in Judge Rubin's dissent. 769 F.2d at 293-97.

We conclude that the first notice of appeal, filed before the intervention motion, was ineffective to confer jurisdiction on this court. The second notice of appeal was filed grossly out of time, with no attempt made to obtain any extension of the deadline for noticing the appeal. *See* Fed.R.App.P. 4(a)(4).

Thus, we have no jurisdiction over the appeal.

The Clark's group's arguments cannot muddy these clear waters. The Clark group argues that it has been placed in a "procedural box from which there is no escape." They argue that they had no "justiciable interest" that had been "impair[ed]" until the school board voted to levy the $.96 increase on August 20, and that therefore it was impracticable for them to move for intervention before the time for appeal ran on August 22. This argument mistakes the nature of the "interest" requirement of Rule 24(a), and of the very concept of intervention. The language of the rule itself contemplates that the affected party can intervene in proceedings that "may" affect him before harm is done by execution of a court order. *See Little Rock School Dist. v. Pulaski County Special School Dist.*, 738 F.2d 82, 84 (8th Cir.1984) ("The rule does not require, after all, that appellants demonstrate to a certainty that their interests *will* be impaired in the ongoing action. It

requires only that they show that the disposition of the action '*may* as a practical matter' impair their interests.") (emphasis in original). A party claiming an interest in the litigation does not have to wait until he has suffered irreparable harm before he has an interest permitting intervention under Rule 24(a). The Clark group had clear notice as early as July 3 that all the parties to the litigation had agreed to the tax hike. On July 23 the court approved the settlement; at that time (at the very latest) the taxpayers had an interest protectible by intervention as of right.

The Clark group further argues that even if its members had moved to intervene sooner, they probably would not have received a ruling from the district court on their motion in time to file a notice of appeal. We have no way of knowing whether they would have received such a ruling in time to appeal, because they made no motion at all until the time for appeal was already gone. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396, 97 S.Ct. 2464; 2471, 53 L.Ed.2d 423 (1977) (holding a motion to intervene for purposes of appeal was timely because it was filed within the period in which the parties could have taken an appeal); *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882, 885 n. 2 (8th Cir.1981) (motion to intervene in appeal filed within time to appeal). If they had moved promptly for intervention, and perhaps had asked for an expedited decision or an extension of the time to appeal, Fed.R.App.P. 4(a)(5), the "procedural box" argument would have considerable force. Since they did none of those things, we are not troubled by this argument.

In light of the Clark group's failure to make a timely motion to intervene and the consequent failure to file a timely notice of appeal, the district court's October 23, 1990, ruling granting the group intervenor status cannot breathe life into rights already foregone.

We therefore dismiss the appeal for lack of jurisdiction. As an epilogue, we observe that though we do not reach the merits of this appeal due to jurisdictional defect, we have studied the parties' briefs and they demonstrate that we are being asked to review an order for abuse of discretion. Were we to consider this issue, suffice it to say that no showing has been made that there was an error of law or an abuse of discretion in approving the settlement.

APPENDIX K

LITTLE ROCK SCHOOL DISTRICT
v.
PULASKI COUNTY SPECIAL SCHOOL DISTRICT,
738 F.2d 82 (1984)

Before ROSS, ARNOLD and JOHN R. GIBSON,
Circuit Judges.

PER CURIAM.

The Little Rock Classroom Teachers Association, The Pulaski Association of Classroom Teachers, The North Little Rock Classroom Teachers Association, and the Presidents of these organizations appeal from the District Court's denial of their motion for leave to intervene in the remedy phase of this case. A few words on the history of the lawsuit are appropriate to place the present issue in context.

This case was brought by the Little Rock School District against a number of defendants, including the two other school districts operating in the Pulaski County, Arkansas, the Pulaski County Special School District No. 1 and the North Little Rock School District. In brief, the plaintiff contends that schools in Pulaski County, Arkansas, are not completely desegregated, and that the defendant school districts are partially responsible for this condition. The principal request made in the complaint is that the three school districts be combined into one. The District Court has held that the defendants are liable for a presently unconstitutional condition in the schools of Pulaski County.

It has set July 30, 1984, as the date for a hearing at which all parties will be allowed to present evidence on the appropriate remedy for this condition. Appellants seek to participate in this hearing.

The appellant teachers' organizations represent the classroom teachers employed by the three school districts. Although school districts in Arkansas are not compelled by state law to bargain collectively with representatives of their employees, each of the districts in Pulaski County has agreed to recognize one of the appellant organizations as the representative of its teachers. Bargaining has taken place, and there are presently in existence contracts governing, in part, the salaries, hours, and terms and conditions of employment of the teachers in the respective school districts.

Appellants first began their efforts to intervene on August 18, 1983. Their motion, filed on that day, was denied by the District Court on September 29, 1983. An appeal was taken to this Court. On December 29, 1983, we affirmed. We said:

> This action is without prejudice to the right of appellants to renew their motion if and when the District Court determines that defendants are liable. The District Court has indicated that it intends informally to bifurcate the proceedings into a liability stage, and if necessary, a remedy stage. If the District Court decides that there is liability, it should then consider whether to permit appellants to participate in the remedy stage of the case.

Little Rock School District v. Pulaski County Special School District No. 1, 725 F.2d 690 (8th Cir. 1983).

Thereafter, on April 13, 1984, the District Court filed its opinion holding defendants liable for the allegedly unconstitutional condition. *Little Rock School District v. Pulaski County Special School District No. 1*, 584 F.Supp. 328 (E.D.Ark.1984). Eleven days later, on April 24, 1984, appellants renewed their motion for leave to intervene, claiming entitlement to intervention as of right under Fed.R.Civ.P. 24(a)(2). The next day, April 25, 1984, the District Court denied the renewed motion. It said:

> The applicants for intervention do not possess interests in this action that will be impaired by the formulation or adoption of attendance zones for [a] consolidated school district. . . . Their rights will ultimately be the subject of bargaining between their representatives and the consolidated school district. The Court's remedial hearing . . . will not impair the ability of the teachers to negotiate in the future. Their motion to intervene is denied.

This appeal followed. Three other parties have filed briefs: the plaintiff Little Rock School District, the defendant North Little Rock School District, and the defendant Pulaski County Special School District No. 1. None of these appellees opposes the motion for leave to intervene.

We reverse. We respectfully disagree with the District Court's assessment of the motion for leave to intervene. Under Fed.R.Civ.P. 24(a)(2), a timely motion for leave to intervene "shall" be granted "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." We believe that the criteria of the rule have been met in this case.

As representatives of the classroom teachers in the three districts, appellants have an interest in the existing agreement, which they themselves have negotiated with the districts involved, and in the continued viability of these agreements. One of the remedies being considered by the District Court is consolidation, the effect of which would be to terminate the independent existence of the three districts presently functioning in Pulaski County and substitute in their place a new, single, consolidated district. Those who have a contract with existing entities have an interest in the continued existence of those entities. It may be true that the successor school district (assuming consolidation is ultimately ordered) will choose to bargain collectively with the appellant organizations, but there can be no assurance of that fact. In addition, even if a successor district does agree to bargain collectively with appellants, there is no assurance that whatever contract will then be agreed on will be as favorable to appellants' members as the present agreements are. In this situation, we think appellants qualify for intervention as of right. The rule does not require, after all, that appellants demonstrate to a certainty that their interests *will* be impaired

in the ongoing action. It requires only that they show that the disposition of the action "*may* as a practical matter" impair their interests. We are satisfied that this demonstration has been fully made.

The rule also requires that the motion for leave to intervene be timely, and that no existing party be an adequate representative of the interests intervenors seek to assert. Both of these requirements are met. The motion for leave to intervene was made promptly, and at the time contemplated by our order of December 29, 1983, in the previous appeal. The three school districts which are the principal existing parties are employers. They can hardly be expected to litigate with the interests of their employees uppermost in their minds. The burden resting on intervenors to show that their interests are not adequately represented by existing parties is a "minimal" one, *Securities & Exchange Comm'n v. Flight Transportation Corp.*, 699 F.2d 943, 948 (8th Cir.1983), citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n.10, 30 L.Ed.2d 686 (1972). This burden has been more than met here.

The judgment is reversed, and the cause remanded to the District Court with instructions to grant the appellants' motion for leave to intervene as parties in the remedy phase of this case. Their intervention shall be for the purpose of litigating the issues raised in their complaint, the protection of their existing contractual rights and their right to bargain collectively. The granting of this motion for leave to intervene need not result in any postponement of the continuation of the trial, now set for July 30, 1984. Intervenors, in other words, must take the lawsuit as they find

it. Indeed, we do not understand them to contend otherwise. Their brief does not request any postponement in the previously set trial date.

Reversed and remanded with instructions.

APPENDIX L

PURNELL v. CITY OF AKRON,
925 F.2D 941 (6th Cir. 1991)

* * * * *

. . . mine the nature of the Fund's interest and found that intervention should have been allowed. *Id.* at 1541. Moreover, several courts have, implicitly at least, rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest. *Cascade Natural Gas corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 132-36, 87 S.Ct. 932, 935-37, 17 L.Ed.2d 814 (1967); *Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349, 352-53 (9th Cir. 1974); *Rios v. Enterprise Ass'n Steamfitters Loc. U. No. 638*, 520 F.2d 352, 357 92d Cir. 1975); *Hatton v. County Bd. of Educ.*, 422 F.2d 457, 461 (6th Cir. 1970) ("Although the interest claimed is of a general *and indefinite character*, it would seem to the Court to be sufficient to permit intervention under . . . *Cascade*" which suggests that the term 'interest' in the amended Rule 24(a) should be construed liberally.").

Contrary to Appellee Purnell's argument, a party seeking to intervene need not possess the standing necessary to initiate a lawsuit. *Trbovich v. United Mine Workers*, 404 U.S. 528, 536-39, 92 S.Ct. 630, 635-36, 30 L.Ed.2d 686 (1972). *See also United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2nd Cir. 1978) (the existence of a case or controversy having been established as between plaintiff and defendant, there was no need to impose a standing requirement on the would-be intervenor). Rule 24(a)(2) uses

the words "may have" in describing the type of interest that qualifies for intervention. The Campbells may ultimately have no standing once the paternity determination is made, but at this point that remains an open question. *Cf. Dotson v. David Int'l Corp.*, 514 F.Supp. 109, 110 (E.D. Tenn. 1981) (the district court held that resolving the paternity issue in a wrongful death action was a prerequisite to ruling on the motion to intervene). Accordingly, we conclude that the Campbell children claim a sufficient interest for intervention as a matter of right.

2. *Extent to Which Denial of Appellant's Motion to Intervene as of Right Impairs its Ability to Protect its Interest*

To intervene as a matter of right, the Campbells must also show that an unfavorable disposition of the action may impair their ability to protect their interest in the litigation. The applicants, however, need not show that substantial impairment of their interest will result, *Neusse v. Camp*, 385 F.2d 694, 701-02 (D.C. Cir. 1967), nor, from the language of Rule 24(a), that impairment will inevitably ensue from an unfavorable disposition; the would-be intervenors need only show that the disposition "*may* . . . impair or impede [their] ability to protect [their] interest." Fed.R.Civ.P. 24(a)(2) (emphasis added).

The administrator urges that there is no impairment of interest by denying intervention because the true beneficiary of this action is the estate of Armstead Land. He is correct with regard to the survival action in count one of the complaint. We interpret count one as seeking damages only for a violation of *Mr. Land's* constitutional rights, specifically *his* first, fourth and fourteenth amendment rights. The Land and Campbell motions to intervene, the amended intervention complaint, and the briefs filed with this court do not suggest otherwise.

APPENDIX M

FEDERAL RULE OF CIVIL PROCEDURE 24

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure**. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. §2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

(Amended Mar. 19, 1948; Oct. 20, 1949; July 1, 1963; July 1, 1966; Aug. 1, 1987; Dec. 1, 1991)